Supreme Court, U.S.
FILED

(1)

No. 95-952023 JUN 13 1996

IN THE

Supreme Court of the United States

October Term, 1995

GARETH A. LINDSEY,

Petitioner,

v.

ALABAMA STATE BAR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

June 13, 1996

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QUESTIONS PRESENTED

1. Whether the "elementary" due process principle that a person must "receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose," *BMW of North America, Inc. v. Gore*, 64 U.S.L.W. 4335, 4339 (U.S. May 20, 1996), governs the penalty phase of a State's quasi-criminal attorney disciplinary proceedings.

2. Whether due process requires that a State's attorney disciplinary board explain "the reasons for [its] determination and indicate the evidence [it] relied on" so as to "demonstrate compliance with th[e] elementary requirement" that its decision "rest solely on the legal rules and evidence adduced at the hearing." *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

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OPINIONS BELOW

The decision of the Alabama Supreme Court, affirming without opinion the order of the Disciplinary Board of the Alabama State Bar (Appendix ("App."), *infra*, 1a) is unreported. The Board's order from which the appeal was taken (App. 2a), and the Board's order denying rehearing (App. 3a), are also unreported.

JURISDICTION

The Alabama Supreme Court entered its judgment on January 19, 1996. A timely application for rehearing was denied on March 15, 1996 (App. 4a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Amend. XIV, § 2.

The Alabama Rules of Professional Conduct provide in relevant part:

> **Rule 8.4. Misconduct.**
> It is professional misconduct for a lawyer to:
> (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
> (b) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
> (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
> (d) Engage in conduct that is prejudicial to the administration of justice;
> (e) State or imply an ability to influence improperly a government agency or official;

(f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable Canons of Judicial Ethics or other law; or

(g) Engage in any other conduct that adversely reflects on his fitness to practice law.

STATEMENT OF THE CASE

On June 22, 1993, the Disciplinary Board of the Alabama State Bar filed a complaint against petitioner Gareth A. Lindsey, who had been in practice in Alabama as a member of its bar for 35 years. Record on Appeal ("Rec.") 233-34. The Board alleged that on November 2, 1992, Mr. Lindsey committed a criminal sexual assault on Mrs. Kathyrn Michele Rogers during a matrimonial law consultation. *See* App. 6a-8a. Specifically, the Board alleged that during the consultation Lindsey told Rogers "that it was necessary for him to go to [a] certain lake property which he owned to check on repairs which were being performed on a trailer on the property"; that he "requested that Mrs. Rogers follow him to the lake property, in her own car, in order to continue the consultation"; and that "[u]pon arrival at the lake trailer, [Lindsey] forced Mrs. Rogers into a bedroom and assaulted her," attempting to remove her blouse in the process. App. 6a-7a.

The Board also alleged that at the trailer on November 2 Lindsey "informed Mrs. Rogers that she could pay his legal fees by having sex with him," and that when Rogers returned to Lindsey's office several days later, Lindsey "renewed his offer to provide her with legal services in exchange for sexual favors." App. 7a.

Based on this factual predicate, the Board claimed that Lindsey's alleged actions constituted "professional misconduct" under two provisions of the Alabama Rules of Professional Conduct: (1) Rule 8.4(b) ("criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects"), and (2) Rule 8.4(g) ("any other conduct that adversely reflects on his fitness to practice law"). App. 7a-8a.[1]

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[1] In the same document that contained the complaint involving Mrs. Rogers, the Board set forth two other, completely separate complaints against

A hearing on these charges was held before the five-member Board on November 17-18, 1994. The hearing was essentially a swearing match between Mrs. Rogers and Mr. Lindsey.

The evidence from Mrs. Rogers, if it could be believed, substantiated the Board's factual allegations. Rogers testified that she had come to see Lindsey hoping to hire him to do an annulment of an earlier marriage, which she assumed had gone through before she married her current husband but which she had just learned was never effectuated. Rec. 148-50. According to Rogers, during their conversation, Lindsey received a call from employees of the gas company who were working on Lindsey's trailer, who said "they had locked their keys and stuff inside the trailer," so that Lindsey "was going to have to run out there and let them in." Rec. 150-51. Lindsey asked Rogers if she wanted to "follow him out there and finish our discussion there because he wasn't going to be able to see me later on, and he thought it would be better if we just went on and finished our discussion while he was unlocking the trailer." Rec. 151. Rogers agreed, and followed Lindsey to the trailer. Rec. 152-53.

Rogers testified that she followed Lindsey into the trailer. Rec. 152. One of the gas company employees was "in the kitchen," according to Rogers, and Lindsey told her "to go down the hall where we could go back there and talk in private." Rec. 153. At the end of the hall, she discovered "a bedroom . . . not an office." Rec. 153. Then, according to a taped interview of Rogers done by the sheriff's department a few hours after the alleged incident, Lindsey suddenly attacked her: "He pushed me on in the bedroom and shut the door behind us and he said, . . . come on, let's try this and uh, you can pay like this and, and I'll get everything done that you need done." Rec. 511. Rogers testified that, while saying this, Lindsey was "[t]rying to take my shirt off . . . tugging it up with both hands and I was tugging it down with both hands and trying to push him away," but that "he got my shirt all the way up over my head just about." Rec. 511-12. Rogers was positive that in

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Mr. Lindsey. *See* Rec. 6-12. One complaint was subsequently dropped, Rec. 60, and on the other Mr. Lindsey was found not guilty. Rec. 88, App. 2a.

tugging at her shirt, Lindsey touched her breast. *Id.* Rogers was afraid. Rec. 524. Her "honest thoughts" were that "he was fixing to rape me." *Id.*

During this rape attempt, according to Rogers, "I told him no that I wasn't paying nobody like that," and that "if he didn't stop I was going to scream," and that "then he stopped I guess maybe because he knew that man was there in the kitchen." Rec. 512. Lindsey then told her "I don't know why you want to be this way, do you want to go back to the office," and Rogers told him no; he then walked out the door and she left as well, crying. Rec. 513.

Rogers reported this attempted rape to the sheriff's office. *See* Rec. 505-24. The sheriff "told Mrs. Rogers that he could wire her and send her to Mr. Lindsey's office to see if he would incriminate himself." Rec. 490-91. Rogers agreed, and returned unannounced to Lindsey's office to meet with him four days later, on November 6, 1992. The sheriff gave Rogers list of questions and topic areas to aid her in this effort to incriminate Lindsey. Rec. 491. Their conversation was ultimately transcribed for use at the disciplinary hearing. *See* App. 10a-14a.

The evidence put on by Mr. Lindsey at the hearing provided a completely different account of these events. When Rogers first called Lindsey's office at 8:03 a.m. on November 2, Lindsey's secretary told her that Lindsey does not do annulments. Rec. 335.[2] Nevertheless, Rogers called back later that morning to speak with Lindsey personally, who told her the same thing, added that he seldom handled domestic relations cases outside the county, where Rogers lived, and gave her names of capable attorneys in her own county. R. 235-36, 249, 288-89. Nevertheless, Rogers called his office again, early that afternoon, insisting to Lindsey's secretary that she had to see him. R. 337. At that point, without his knowledge Lindsey's secretary made an appointment for her to see Lindsey that afternoon. Rec. 250, 338.

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[2] Mr. Lindsey testified that "in thirty-seven years, I have handled one annulment. I just don't do them. I won't do them, and there's really a reason for it. I have never seen one that I didn't think that there was perjury committed and the lawyer knew it." Rec. 245.

Rogers was waiting for Lindsey when he returned to the office early that afternoon. Rec. 339. He kept the appointment that his secretary had made for him and talked with Rogers. He told her that he thought she would need a divorce rather than an annulment but, in any event, he was not willing to handle the case. They continued to talk after he told her he would not take her case; as Lindsey explained at the hearing, "when you've got a small country practice, you don't, you know, hurry anybody." Rec. 252. While they were talking, Lindsey received the telephone call informing him that two men working at his trailer had locked themselves out and needed to be let back in. Rec. 150-51, 252-53. Rogers said that she thought the farm and lake where the trailer was located must be pretty, and asked if she could go up to see it with him. Rec. 253-54. Lindsey found "something unusual" about this request — specifically, he thought that "she was trying to hustle me for a fee on the matter of getting" an annulment. Rec. 254-55. Nevertheless, he agreed to let her follow him up to the trailer, admitting later that that was "a stupid thing" to do. Rec. 255.

Lindsey testified that he never pushed Rogers into the bedroom, never touched her in any way, and never made any sexual advances toward her. Rec. 299. Rather, it was at the trailer that it became completely clear that she was trying to "hustle" him to do the case for her in exchange for sex. Rec. 270-71. Rogers sat down on the bed and began imploring Lindsey, saying "I wish you would reconsider working for me on this case." Rec. 266. She explained that she was laid off and didn't have money to pay a lawyer, and that her current husband wasn't willing to help her pay any of it. Rec. 269-70. Lindsey derisively rejected this line of conversation, saying: "Well, evidently . . . what you've got to pay a fee with is what you brought with you," which he immediately said "might make interesting conversation, but I've got someplace else I've got to go." Rec. 300; *see also* Rec. 270-71. Following their brief conversation, he left to complete a business transaction involving his farm. Rec. 173-74. Rogers left separately. Rec. 271.

After November 2, Lindsey concededly made no effort of any kind to contact Rogers. Rec. 217. Instead, she appeared without warning at his office four days later, on November 6. Lindsey invited Rogers in to his office to talk, later admitting that it was "a little bit dumb" to not simply tell her to get out of his office. Rec. 273. The transcript of the conversation (*see* App. 10a-14a) corroborates Lindsey's testimony that he never touched Rogers in the trailer or made any advances toward her. Despite instructions from the sheriff, Rogers made no effort to suggest that Lindsey had attempted to rape her; instead, she vaguely said that Lindsey had taken her "by surprise" at the trailer, to which Lindsey answered: "Why?," "What?" and "How come?" App. 10a. Contrary to the Board's allegations, *see* App. 7a, the transcription also makes clear that Lindsey never "renewed" any "offer to provide her with legal services in exchange for sexual favors." App. 7a. Rather, Rogers brought up the issue, and Lindsey quickly realized that Rogers was seizing on his dismissive comment at the trailer about what she had to offer for payment and was now trying, yet again, to "offer[] herself . . . in exchange for a fee." Rec. 310.

Using language for which he later offered profound apologies, Lindsey decided to go along with it, "talking trash" or "just big-mouthing," as he put it. Rec. 311-12.[3] The conversation ended

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[3] Thus, when Rogers asked him how many times she would "have to do it to pay my fee off," Lindsey asked, "[h]ow many times do you want to do it?," and suggested, "[w]ell, you might like it too." App. 10a-11a. After being pressed several times, Lindsey ultimately threw out the figure of half a dozen times. *See* App. 13a, Rec. 274-75. Similarly, Rogers raised the question of whether "kinky" sex would be involved and he immediately dismissed the idea, but then asked her, "[d]o you do kinky stuff?" App. 13a. When she said, "[t]hat depends on what you mean by kinky," he responded: "Well, you were the one that brought it up." App. 13a.

Lindsey acknowledged to the Board that in handling the conversation this way he committed an act of "stupidity," saying "[i]f I am charged with stupidity, I plead guilty." Rec. 311. He further acknowledged that he "owe[d] everybody an apology" for engaging in such vulgar talk. Rec. 312.

with him suggesting that they meet at the trailer at 1:15 p.m., just 55 minutes later, and her agreeing to it. App. 14a. Mr. Lindsey testified without contradiction that he "wasn't going to meet her ever," that he had no intent to carry out anything in the conversation, and that instead he simply went home to lunch and then went to business meetings. Rec. 276-80, 306-07, 312-13.

Other evidence undermining Mrs. Rogers' story was presented at the hearing. On its face, Rogers' testimony about the events in the trailer was absurd. Rogers could not explain why, when Lindsey supposedly started pulling her shirt off in an attempt to rape her, she did not scream to attract the attention of the gas company employee in the next room; rather, she testified, she merely "told him no" in a voice that was not loud enough to be heard by the worker. Rec. 154. Instead, in a normal voice she merely threatened that if Lindsey did not stop, "I'm going to scream. Those people are out there. They will hear me." Rec. 155. Neither of the gas company employees noticed anything out of the ordinary. Rec. 294-96, 364.

Further, during a taped interview later that evening, Rogers lied to the sheriff when he probed for a possible motive to fabricate her report of sexual assault and attempted rape. When asked if she and her husband were "having any financial difficulty," she replied "no." Rec. 522. In fact, at the time Rogers was laid off from work and her husband was making only $100 a week, Rec. 188, 190; her checking account, which she used to pay all her bills, had only $300 in it, Rec 190-91; her family was receiving food stamps, Rec. 186; and medical difficulties suffered by both her and her husband had led to about $100,000 in medical bills, with some of the hospitals already having begun collection actions. Rec. 184-86. Her husband had concededly told her that Lindsey was a "rich lawyer." Rec. 526. The last piece of the motive was revealed when, less than a week after her last meeting with Lindsey, an attorney hired by Rogers wrote Lindsey threatening a civil lawsuit, and warning of an ominous "ethical violation," if Lindsey did not immediately settle with Rogers for $500,000. Rec. 498. When Lindsey refused to give in, Rogers filed suit, seeking $12,000,000. Rec. 500-03.

On this record, the Board deliberated and announced its decision orally at the close of the two-day hearing as follows:

> As to charge one of 92-492, the panel finds the respondent not guilty. As to charge two of 92-492, the panel finds the respondent guilty.

App. 15a. This was the extent of the Board's explication of its decision with regard to liability. Its written order is similarly silent with respect to the reasons for the Board's liability finding and the evidence it relied upon. *See* App. 2a. The Board then moved on to the penalty phase of the proceeding: "the point where the respondent and the Office of General Counsel presents whatever they want to in mitigation or aggravation of the offense and makes recommendations with regard to appropriate discipline." App. 16a.

Counsel for the Alabama State Bar requested that Mr. Lindsey be publicly disciplined and suspended from the practice of law. *See* App. 17a. At this juncture, counsel for Mr. Lindsey promptly requested a statement by the Board of *what* offense it had found Lindsey guilty of, inasmuch as the Board had obviously decided not to credit Mrs. Rogers' testimony, and therefore it was not clear what basis, if any, existed for finding a disciplinary violation. Counsel for Lindsey pointed out the difficulties of arguing about the appropriate penalty for a violation of Rule 8.4(g), targeting "other conduct that adversely reflects on [an attorney's] fitness to practice law," without knowing what "other conduct" the Board had found Lindsey guilty of:

> [O]ne of my disadvantages here in terms of discussing with you or rebutting [Bar counsel's] argument about some very severe discipline that he's requested is knowing what you found in terms of what Mr. Lindsey has done, and we would request that you inform us as to that so that we can —
>
> THE CHAIRMAN: Well, we have delineated our ruling I think as best we need to at this point in time.

App. 19a. The Board refused to give any further explanation.

Thwarted in his attempt to learn what Lindsey had been found to have been guilty of, counsel for Lindsey was left to argue that, even if the Board had found Lindsey guilty of making some

unwanted sexual contact with Rogers that fell short of a crime, fairness required that for even that level of misconduct, only a private disciplinary warning should be imposed, given that such a sentence had been handed out in another case that involved two such incidents, each handled privately. *See* App. 19a-20a.

Only after argument on the penalty did the Board provide any explanation of what it had found Mr. Lindsey guilty of, and even that explanation was vague. The Board stated that it had not chosen to credit Rogers' testimony that a crime occurred in the trailer on November 2, but:

> As to *the other conduct* that is reflected on the recording, the panel is extremely disturbed by that conduct and by what it has heard and by the circumstances that led up to that visit on November 6, including the trip out to the trailer, even though we do not find and we are not convinced that a crime occurred. But we do believe that an impropriety started at that point and it continued and culminated during the visit on November the 6th. This panel does not enjoy the position it's in, but it does feel that the conduct of the respondent in this situation was indeed abhorrent and reprehensible and that it cannot be tolerated and, for that reason, it is the decision of the panel and the panel so orders that the respondent, Mr. Gareth Lindsey, be suspended from the practice of law for a period of sixty days.

App. 22a-23a.

Mr. Lindsey then filed a post-hearing brief protesting the Board's complete failure to provide him any notice of his offense prior to the penalty phase and the lack of fair notice, in general, that whatever he had been found to be guilty of could lead him to be suspended from the practice of law. Rec. 94-104. In particular, Lindsey emphasized that he was "entitled to know what the panel found with respect to his guilt." Rec. 5. The Board rejected these arguments without comment. *See* App. 3a. Lindsey reiterated these arguments on appeal to the Alabama Supreme Court, which likewise rejected them, without oral argument or opinion. App. 1a, 4a.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two fundamental reasons, both growing out of the majority and concurring opinions recently issued by this Court in *BMW of North America, Inc. v. Gore*, 64 U.S.L.W. 4335 (U.S. May 20, 1996).

1. In the *BMW v. Gore* case, this Court held that:

> Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose.

64 U.S.L.W. at 4339. Likewise, the concurring opinion in *BMW v. Gore* emphasized "the constitutional importance of legal standards that provide 'reasonable constraints' within which 'discretion is exercised.'" *Id.* at 4343 (Breyer, J., joined by O'Connor and Souter, JJ., concurring) (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20-21 (1991) (Kennedy, J., concurring in judgment)). The concurring opinion faulted the Alabama courts for applying "vague and open-ended" standards "to the point where they risk arbitrary results." *Id.*

Plainly, the elementary notions of fairness and the need to prevent the application of vague and open-ended standards of punishment embraced in this Court's decision in *BMW v. Gore* were not followed by the Disciplinary Board of the Alabama State Bar, or by the Alabama Supreme Court, in this case. After all, even though the testimony of the complaining witness was evidently disregarded by the Board, and the Board failed to find Mr. Lindsey guilty of violating Rule 8.4(b), the Board nonetheless found him guilty of violating Rule 8.4(g), which prohibits "conduct that adversely reflects on his fitness to practice law."

Mr. Lindsey has no basis for knowing what the Board has found him guilty of, and obviously therefore cannot be said to have been on notice that, for committing this offense (whatever it is), he faced receiving a 60-day suspension from the practice of law. Prior to this case, the Alabama Supreme Court had put attorneys on notice that the purpose of Rule 8.4(g) is simply to "ensure a good faith effort by attorneys to abide by the disciplinary rules," preventing them

from "show[ing] an indifference to the purpose and spirit" of specific, narrower rules. *Norris v. Alabama State Bar*, 582 So.2d 1034, 1037 (Ala. 1991). Because the Board evidently concluded that Mr. Lindsey did not engage in a sexual assault on Mrs. Rogers, and therefore had fully complied with the only other rule that he was accused of violating (Rule 8.4(b)), there is no basis in *Norris* for any sanction under Rule 8.4(g), much less a 60-day suspension.

Clearly, suspensions from the practice of law have the same quasi-criminal character, and stigmatize at least as much, as punitive damage awards. *See, e.g., In re Ruffalo*, 390 U.S. 546, 551 (1968); *see also id.* at 554-55 (White, J., joined by Marshall, J., concurring in the result). Therefore, certiorari should be granted to ensure the enforcement of elementary principles of due process in this important analogous area. At minimum, because the Alabama Supreme Court decision below issued in January, 1996, certiorari should be granted, and the judgment vacated and the case remanded, for further consideration in light of *BMW v. Gore*.

2. Likewise, certiorari is justified on the second question. Due process surely requires that a State's attorney disciplinary board explain "the reasons for [its] determination and indicate the evidence [it] relied on" so as to "demonstrate compliance with th[e] elementary requirement" that its decision "rest solely on the legal rules and evidence adduced at the hearing." *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *see also Hameetman v. City of Chicago*, 776 F.2d 636, 645 (7th Cir. 1985) (Posner, J.). Imposing this requirement in this context is essential to "assur[ing] the uniform general treatment of similarly situated persons that is the essence of law itself." *BMW v. Gore*, 64 U.S.L.W. at 4343 (concurrence). For this reason as well, this case should at minimum be sent back to the Alabama Supreme Court for further consideration.

CONCLUSION

For all these reasons, certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

June 13, 1996

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APPENDIX A

Jan. 19, 1996

STATE OF ALABAMA -- JUDICIAL DEPARTMENT
THE SUPREME COURT
OCTOBER TERM, 1995-96

1941035

Gareth A. Lindsey v. Alabama State Bar (ASB 92-492)

PER CURIAM.

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(D), Ala. R. App. P.

Hooper, C.J., and Maddox, Shores, Houston, Kennedy, Ingram, and Cook, J.J., concur.

Butts, J., recuses.

APPENDIX B
BEFORE THE DISCIPLINARY BOARD
OF THE ALABAMA STATE BAR

IN THE MATTER OF	)	
GARETH A. LINDSEY,	)	CASE NOS. ASB 92-492
AN ATTORNEY AT LAW	)	& 92-536

ORDER

This matter having come before the Disciplinary Board of the Alabama State Bar for a disciplinary hearing and said hearing having been commenced on Thursday, November 17, 1994, and concluded on Friday, November 18, 1994, and the Board having heard the testimony of respondent and other witnesses, having considered evidence and the arguments of counsel, hereby enters the following Order:

1. In ASB 92-536, the respondent is found not guilty on all charges.

2. In ASB 92-492, the respondent is found not guilty on Charge I and guilty on Charge II. Discipline is set at suspension from practice of law for a period of sixty (60) days, effective forty-two (42) days from the date of this Order.

3. Costs of these proceedings shall be taxed against the respondent attorney.

DONE this 28 day of November, 1994.

/s/ John S. Key, Acting Chairman
Panel I, Disciplinary Board
Alabama State Bar
P.O. Box 1607
Decatur, Alabama 35602-1607
(205) 353-6761

APPENDIX C
BEFORE THE DISCIPLINARY BOARD
OF THE ALABAMA STATE BAR

IN THE MATTER OF	)	
GARETH A. LINDSEY,	)	CASE NOS. ASB 92-492.
AN ATTORNEY AT LAW	)	92-536 & 92-537

ORDER

This matter coming before Panel I of the Disciplinary Board of the Alabama State Bar on the Motion of the respondent attorney for postjudgment relief, and the Board having considered said Motion and the Brief submitted by respondent in support thereof and having heard arguments by respondent and the Office of General Counsel, the Board is of the opinion that said Motion is due to be and is hereby DENIED.

DONE this 17 day of March, 1995.

/s/ John S. Key, Acting Chairman
Panel I, Disciplinary Board
Alabama State Bar
P.O. Box 1607
Decatur, Alabama 35602-1607
(205) 353-6761

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

March 15, 1996

1941035

Gareth A. Lindsey v. Alabama State Bar (ASB: 92-492)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

PER CURIAM -- Hooper, C.J., Maddox, Shores, Houston, Kennedy, Ingram and Cook, J.J., concur; Butts, J., recuses.

APPENDIX E

IN THE SUPREME COURT OF ALABAMA

S. C. NO. 1941035

GARETH A. LINDSEY,
APPELLANT,

VS.

ALABAMA STATE BAR,
APPELLEE.

RECORD ON APPEAL

[EXCERPTS]

[Rec. 004]

BEFORE THE DISCIPLINARY BOARD
OF THE ALABAMA STATE BAR

IN THE MATTER OF	)	
GARETH A. LINDSEY,	)	CASE NO. ASB 92-492;
AN ATTORNEY AT LAW	)	92-536; & 92-537

Comes now the Alabama State Bar, by and through the Office of General Counsel, and avers that it has probable cause for believing, and does believe and allege that Gareth A. Lindsey, (hereinafter, "respondent attorney"), has been guilty of violating or failing to comply with certain provisions of the Code of Professional Responsibility and certain provisions of the Rules of Professional Conduct of the Alabama State Bar, in that:

COMPLAINT ONE [92-492]

Charge I

[Violation of Rule 8.4 (b)]

1. At all times pertinent hereto, the respondent attorney was licensed to practice law in the State of Alabama, having his principle place of practice in Elba, Coffee County, Alabama.

2. On or about November 2, 1992, Katheryn Michele Rogers went to respondent's law office for the purpose of consulting respondent about a matter of matrimonial law.

3. During the course of the consultation, respondent told Mrs. Rogers that it was necessary for him to go to certain lake property which he owned to check on repairs which were being performed on a trailer on the property.

4. Respondent requested that Mrs. Rogers follow him to the lake property, in her own car, in order to continue the consultation.

[005]

5. Upon arrival at the lake trailer, respondent forced Mrs. Rogers into a bedroom and assaulted her.

6. During the course of the assault, respondent attempted to remove Mrs. Rogers' blouse.

7. Respondent informed Mrs. Rogers that she could pay his legal fees by having sex with him.

8. Mrs. Rogers refused respondent's offer, and left the trailer immediately.

9. On or about November 9, 1992, Mrs. Rogers returned to respondent's office whereupon respondent renewed his offer to provide her with legal services in exchange for sexual favors.

10. The respondent arranged with Mrs. Rogers for her to leave his office and meet him at his lake trailer later that same day.

11. Mrs. Rogers left respondent's office but did not meet him as arranged.

12. Mrs. Rogers surreptitiously tape recorded the entire conversation which occurred between respondent and Mrs. Rogers on November 9, 1992, in respondent's office.

13. In doing the above-described acts, the respondent attorney was guilty of violating Rule 8.4 (b) of the Rules of Professional Conduct, which provides as follows:

> Rule 8.4 ***
>
> "It is professional misconduct for a lawyer to:
>
> ***
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;" **[006]**

Charge II
[Violation of Rule 8.4(g)]

1. For Charge II of Complaint One, the Office of General Counsel adopts all the allegations of paragraphs one through twelve of Charge I, Complaint One, and further alleges:

2. In doing the above-described acts, respondent attorney violated Rule 8.4(g) of the Rules of Professional Conduct, which provides as follows:

Rule 8.4 * * *

"It is professional misconduct for a lawyer to:

* * *

(g) engage in any other conduct that adversely reflects on his fitness to practice law."

* * *

Dated: June 22, 1993

/s/ L. Gilbert Kendrick
Assistant General Counsel
Alabama State Bar

BEFORE THE DISCIPLINARY BOARD
OF THE ALABAMA STATE BAR
MONTGOMERY, ALABAMA

IN THE MATTER OF	)	
GARETH A. LINDSEY,	)	ASB NO. 92-492
AN ATTORNEY AT LAW	)	

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PROCEEDINGS taken before the Alabama State Disciplinary Board, Panel I, at the Alabama State Bar Headquarters, 415 Dexter Avenue, Montgomery, Alabama, on Thursday, November 17, 1994, and Friday, November 18, 1994, and reported by Julie A. Duncan, Commissioner for the State of Alabama at Large.

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[Rec. 492]

OFFICE OF GENERAL COUNSEL EXHIBIT # 3
TRANSCRIPT OF TAPE OF NOV. 6, 1992

Gareth	Have you had lunch?
Michelle	Not yet.
Gareth	You still needin' divorcin'?
Michelle	Yeah.
Gareth	Awh, hell.
Michelle	I'm sorry about Monday.
Gareth	Why?
Michelle	It took me by surprise there.
Gareth	What?
Michelle	I said you kind of took me by surprise.
Gareth	How come I took you by surprise?
Michelle	I just wasn't expecting it.
Gareth	You weren't?
Michelle	No but I've thought about your offer and I don't got a lot of money . . . and we could work things out that way . . . it might be for the best.
Gareth	Okay, we can work it out that way.
Michelle	What exactly would I have to do?
Gareth	You don't have to do anything you don't want to do.
Michelle	How many times would I have to do it to pay my fee off?

Gareth — How many times do you want to do it?

Michelle — That's you . . . it's your fee.

Gareth — Well, you might like it too.

Michelle — I don't know, but I reckon we'll see.

Gareth — There you go. Okay.

Michelle — Nobody would know about this, would they?

Gareth — Hell no!

Michelle — It would be confidential? **[493]**

Gareth — You're god damn right.

Michelle — I just don't usually go around making love to people for payment.

Gareth — Me neither, but at the same time . . . Shit no. There ain't no way anybody can know anything about this.

Michelle — Yeah, cause I wouldn't want my husband to find out about this. I've got enough problems as it is right now.

Gareth — Okay.

Michelle — That was just a little awkward Monday them gas people there and all and,

Gareth — Yeah, yeah.

Michelle — That just kind of . . .

Gareth — It was for me too, it was for me too.

Michelle — . . . took me by surprise. Maybe if you would have said something before we went out to the trailer I might have . . .

Gareth — Not even . . . not even anybody in this office, because this, this, this, ole gal out here, you know and that ole gal up there . . . I hang my

hat on the door knob kind of, you know, she's by here and they talk a lot and all this kind of shit.

Michelle — Yeah, your wife? That's who you're talking about?

Gareth — Huh?

Michelle — Are you talking about your wife?

Gareth — I'm talking about the one I live with anyhow.

Michelle — Oh yeah.

Gareth — And uh, you know I don't want any problem and I don't want to give you any problem.

Michelle — Yeah.

Gareth — So it needs to be confidential. Are you going to be in town a little while this afternoon?

Michelle — Well, my husband is expecting me back today and I've got to pick my kids up from school at 2:30 and so that's why I told her I had to wait and see you. And, I had a few errands to run but I just wanted to see if you wanted to set it up that way and . . . **[494]**

Gareth — Allright, let's go try it.

Michelle — And how may times it would have to be done and all to pay off and I'm not sure how high your fee is but I know my father-in-law and them told me you were the best lawyer and that's what I need, so . . .

Gareth — Well, I appreciate that.

Michelle — And I don't have a lot of money like I said and I'm not going to make my husband pay for any of this.

Gareth — Okay.

Michelle — Where would this all take place and I mean . . .

Gareth — Right up there at that trailer.

Michelle — At that trailer?

Gareth — That suit you?

Michelle — That'd be fine. (laughs nervously) Is it gonna' be a lot of times, or . . .

Gareth — Well, let's see. How about half a dozen times.

Michelle — Half a dozen?

Gareth — Something like that.

Michelle — Gonna' be any kinky stuff involved, or . . .?

Gareth — No . . . no.

Michelle — Just basic sex?

Gareth — Just basic, yeah. Do you do kinky stuff?

Michelle — Not really.

Gareth — Would you do it?

Michelle — I reckon I could.

Gareth — Like what?

Michelle — That depends on what you mean by kinky.

Gareth — Well you were the one that brought it up, so you, you know . . . What is kinky to you?

Michelle — Uh, I don't know. I just know some people have got strange **[495]** sexual habits so.

Gareth	Well, all righty. It's 20 minutes after 12. Suppose I meet you there at 1:15.
Michelle	At the trailer?
Gareth	Yeah.
Michelle	Okay. And that would take uh, one off the six, huh?
Gareth	That will take one off the six. (Laughs).
Michelle	This is going to pay my fee and you are going to take care of my legal problems, right.
Gareth	Hell yeah I'll take care of you.
Michelle	Okay. I ain't never done nothing like this before in my life.
Gareth	Me either.
Michelle	Somehow I don't believe you.
Gareth	(laughs)
Michelle	So 1:15?
Gareth	Yup.
Michelle	Okay, well I reckon I'll see you then.
Gareth	Alright.
Michelle	Alright then.

Footsteps leaving office.

Gareth	Okay.
Michelle	Thanks for seeing me.
Gareth	Okay.

[Rec. 455]

THE CHAIRMAN: Okay. The panel has deliberated this morning and last night with reference to both complaints that are pending against Mr. Gareth Lindsey; that is, 92-492 and also 92-536. And we are prepared to render judgment at this time as to **[456]** first 92-492.

As to charge one of 92-492, the panel finds the respondent not guilty. As to charge two of 92-492, the panel finds the respondent guilty.

Now, with that, we would excuse this lady and ask Mr. Blackmon to come in.

(Brief pause)

THE CHAIRMAN: Let the record reflect that Ms. Rogers has been excused from the hearing room and Mr. Blackmon is now in the room.

The panel has also considered complaint two, ASB 92-536, and finds the respondent not guilty of all charges under that particular complaint.

Any questions? Are you ready to proceed further at this time?

MR. KENDRICK: Yes, sir. Mr. Blackmon, you need to leave the room.

THE CHAIRMAN: We will now address the **[457]** Rogers. That's right. Mr. Blackmon may be excused and —

MR KENDRICK: She can come back in, I assume.

THE CHAIRMAN: Ms. Rogers?

MR KENDRICK: Yes.

MS. GLASSROTH: Johnny, will you tell Michelle she can come back in here, please?

MR KENDRICK: We are now at the point where the respondent and the Office of General Counsel presents whatever they want to in mitigation or aggravation of the offense and makes recommendations with regard to appropriate discipline.

One of the things that the panel is allowed to consider, expected to consider, is prior discipline that has been imposed on the respondent. And I have here copies of the —

(Brief pause)

MR KENDRICK: Are you ready to proceed?

THE CHAIRMAN: We are ready. **[458]**

MR KENDRICK: The Office of General Counsel recommends in this case that public discipline be imposed. I think we need to let the members of our profession and the public know that this is not the kind of conduct that is condoned or permissible in our profession.

I would also point out to you that the Supreme Court has eliminated private discipline. It doesn't take effect until January 1st and would not apply to this case, but I think that is something that you can consider in reaching a decision about the discipline to be imposed here.

I am going to recommend to you that you impose some public discipline that really has some impact to it. I am going to recommend that Mr. Lindsey be suspended from the practice of law for a period in between forty-five days, which is the minimum **[459]** suspension, and ninety days, which is the minimum suspension that does not require petition for reinstatement.

The one case that we have that's similar to this that involves sexual misconduct is charges brought against Mr. John Courtney in Mobile for making sexual advances to a client. In that case he was given a forty-five-day suspension. I think that is — I am sorry.

(Off-the-record discussion)

MR KENDRICK: I stand corrected. He was given a six-month suspension. I would point out to you that Mr. Courtney had a prior complaint that involved sexual misconduct. It wasn't his first time doing this sort of behavior. So far as our records reflect, this is Mr. Lindsey's first time. But I think public discipline that really has some teeth in it is what's called for under these circumstances, and I would recommend **[460]** to you that you suspend Mr. Lindsey for — from the practice of law for a period of time somewhere in between forty-five and ninety days.

MR. BEDSOLE: Didn't Mr. Courtney also have more than one charge against him under that six-month suspension? Wasn't it more than one individual involved?

MR KENDRICK: He just had one case against him, but —

MR. BEDSOLE: Yes, I knew —

MR. NIX: I have got the case here.

MR KENDRICK: It went up on appeal. Do we have a — you may want to look at the — no, there was only one complaint. He was — this was in 1990. He was charged under the old rules, DR 102(A) and — (A)(4) and DR 102(A)(6), the predecessors to the two rules that he's charged with violating this case; in fact, they are almost identical in language.

MR. BEDSOLE: Thank you. **[461]**

MR KENDRICK: And I think you can take this file with you in your deliberations and review it to whatever extent you feel it is appropriate. I think that the appellate opinions in the file also — if you find that, Vickie, you might pull it out.

MR. FOWLER: Enlighten me on your comment about the discipline. You said after the first of the year what?

MR KENDRICK: The Supreme Court has adopted an amendment to our rules that does a number of things. One, it puts a lay person on the disciplinary panels and several other things, one of which is it eliminates private discipline. An attorney can still be given what we call a private reprimand, but if anyone — and we do not publish it as we do a public reprimand. But if anyone calls the Bar and asks if an attorney has been disciplined and he has a private **[462]** reprimand, then we are obligated under the new rules adopted by the Supreme Court to disclose that to anyone upon inquiry.

THE CHAIRMAN: Okay. Chip?

MR. NIX: May I have a very, very brief like sixty-second private conference with Frank and Gareth?

THE CHAIRMAN: Certainly.

(Brief pause)

MR. NIX: Your honor, my understanding of the panel's ruling is that there is a violation with respect to the second aspect of the second count of the Rogers complaint, and that count is under 8.4(g), I believe, which is — I don't have the exact verbiage with me.

THE CHAIRMAN: 8.4(g) is correct.

MR. NIX: It is professional misconduct for a lawyer to engage in any other conduct that adversely reflects on his fitness to practice law.

And so one of my disadvantages **[463]** here in terms of discussing with you or rebutting Mr. Kendrick's argument about some very severe discipline that he's requested is knowing what you found in terms of what Mr. Lindsey has done, and we would request that you inform us as to that so that we can —

THE CHAIRMAN: Well, we have delineated our ruling I think as best we need to at this point in time.

MR. NIX: All right, sir. Then we would simply point up to you the case, the Courtney case. The allegations of that case, the complainant, a divorced female, was present in the defendant's law office to discuss a lawsuit in which her minor child was represented by the defendant. She alleges that after a brief discussion about the progress of the lawsuit, the defendant began asking her personal questions about dating married men. She further alleges **[464]** that as she began to leave the office, the defendant came up and put around me — this is a quote — came up and put around me and put his arm — came up and around me and put his arm around my waist and then started fondling my buttocks and that then he kissed her on the cheek. The complainant immediately left the office and she subsequently filed a complaint with the Mobile County Bar Association.

And in the — on page 1004 in that opinion, which is cited at 492 So.2d, 1002, page 1002, the following facts are demonstrated when the Supreme Court is reviewing the sentence in this matter.

Barely two months before the incident presently in question, the defendant had received a private informal admonition from the Bar for similar conduct — similar conduct — toward a female client. Within **[465]** the three years prior to this incident, the defendant had received a private reprimand and a sixty-day suspension for other improper conduct. In light of the above, we

cannot say that the board was in error in prescribing the public censure.

I don't know exactly how that case was tried. I don't know how cooperative Mr. Courtney was. I don't know how he presented his side of this matter. I do know that Mr. Courtney in this situation denied the allegations. But it's clear that he had other problems of a similar nature and he had had them not very long before this particular occasion. And he had in fact been formally disciplined for those other problems of a similar nature. And I would submit to you that this case does not warrant anything more than the lightest thing that you can do **[466]** and the very lightest thing that you can do.

And I would say that for the following reasons. I think the only thing you could possibly find in this case is that Mr. Lindsey's conversation in his office with her — with Ms. Rogers — on November 6 was so inappropriate that it bore in some way upon his feelings. I don't know whether that's what you have decided. But certainly you have found that there was no criminal conduct here.

And I think that you have seen Mr. Lindsey's very sincere presentation. We have tried to assist the panel in determining what the true facts are. And in many ways, quite frankly, these proceedings have been somewhat mean spirited toward him and in some ways, quite frankly, inappropriate.

He has suffered a great deal **[467]** because of this already. It would be, I think, unwarranted to impose anything other than the lightest thing you could impose.

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[476] MR KENDRICK: Let me make just a couple additional comments in drawing parallels between this case and the Courtney case. Mr. Courtney was given a six-month suspension for putting his hands on a female client against her will. In this case, if you believe the testimony of Ms. Rogers — and I think you have

indicated you do by the verdict you have rendered — he not only put his hands on her; he tried to remove her clothing. But more important than that and most significant is, unlike Mr. Courtney, Mr. Lindsey was willing to trade sexual intercourse for his fee. Now, that is something this profession simply cannot condone. **[477]**

Now, Mr. Courtney had a history of doing this and that's why he got popped so hard in addition to the actual circumstances. But the circumstances of Mr. Courtney's case are nowhere as egregious as the circumstances we have got in this case. Mr. Courtney wasn't trying to trade sex for his legal services. He simply was making a pass at a client. Mr. Lindsey has been willing to say to a client I will do what my profession has trained me to do in exchange for your letting me have sex with you. That's about as bad as anything a lawyer can do.

I think a minimum discipline in this case has to be suspension from the practice of law for some period of time.

THE CHAIRMAN: Any questions?

MR. BEDSOLE: Mr. Tipler, what — we are in the penalty phase of our discussion at this point. What do **[478]** you suggest would be an appropriate penalty?

MR. TIPLER: Private reprimand. That's my idea of what it should be. I believe I am right in what I think you found. I don't think you found that he raised her skirt and all that kind of stuff. I think you found that he made those — however you interpret them, you will find that he made those statements that are on that tape. That's what I think you found. And I — if I were sitting there, I might have done the same thing.

But I tell you this. I do think that what he has gone through, is going through, is more punishment than I could stand. I don't believe I could stand to go through it, and I doubt if any of you can, because y'all are all well known, good lawyers. And it's more

important to somebody like that. **[479]**

I remember one time saying to be brought up here, if I had to go, it would be like — to me, it would be a capital case; and to a real lawyer it is. And the punishment of a private reprimand for this is severe, because I don't think he meant it. But even if he — those words were said, I have to go along with you on that; and that's the worst thing that happened in this case, those words were said. And they were — she was set up. She was given questions to ask. She was wired. And I hate to think that everybody that has ever been in my office was wired or in yours. I think that is more than sufficient, private reprimand.

Thank you.

THE CHAIRMAN: Okay. We will go back into deliberations.

(Short recess until 10:20 a.m., at which time the following proceedings occurred.) **[480]**

THE CHAIRMAN: Let the record reflect at this time the panel has considered and discussed the discipline that should be imposed on the respondent in this case for the violation of Rule 8.4(g) and we are ready to impose this. But at this time let me make this comment, that the standard of proof in this case is clear and convincing evidence. This panel was not clearly convinced by the evidence that a crime occurred at the trailer on November 2 and, for that reason, found the respondent not guilty of the first charge.

As to the other conduct that is reflected on the recording, the panel is extremely disturbed by that conduct and by what it has heard and by the circumstances that led up to that visit on November 6, including the trip out to the trailer, even though we do not find and we are not convinced that a crime occurred. **[481]** But we do believe that an impropriety started at that point and it continued and culminated during the visit on November the 6th. This panel does not enjoy the position it's in, but it does feel that the conduct of the respondent in this situation was indeed abhorrent and reprehensible

and that it cannot be tolerated and, for that reason, it is the decision of the panel and the panel so orders that the respondent, Mr. Gareth Lindsey, be suspended from the practice of law for a period of sixty days.

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